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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-873

JAMES PHILLIPS and CITIZENS STATE BANK OF VIOLA, KANSAS,
Petitioners,

vs.

GRAF ELECTRIC, INC.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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STATEMENT OF FACTS

On July 23, 1973, the respondent, Graf Electric, Inc., filed an action in the Court of Common Pleas, Sedgwick County, Kansas. A Summons and Complaint were served upon petitioner, James S. Phillips, the same day.

On August 6, 1973, a Journal Entry of Judgment was obtained against petitioner Phillips for failure to appear in the action. Petitioner appealed to the District Court of Sedgwick County, Kansas, on August 16, 1973, and petitioner filed an Answer to respondent's Complaint.

The matter was set for trial on December 27, 1973. Petitioner Phillips was fully aware of the date for trial, in that the administrative judge of the District Court of Sedgwick County, Kansas, had notified the petitioner by telephone as to said trial date. Petitioner failed to appear for trial and a default judgment was entered in respondent's favor.

An amended motion for vacating the judgment rendered was filed by petitioner Phillips on September 30, 1974. On October 4, 1974, the District Court overruled the motion to vacate the judgment and found that there was no violation of the due process clause to the United States Constitution.

Petitioner Phillips then appealed to the Kansas Supreme Court. Upon motion to dismiss by respondent for lack of jurisdiction, the Kansas Supreme Court dismissed the appeal. Petitioner moved for rehearing or modification of dismissal and such was denied by the Kansas Supreme Court.

On April 15, 1974, the respondent was granted an Order to garnish funds or property of the petitioner Phillips from the Citizens State Bank. On May 6, 1974, petitioner Citizens State Bank filed an Answer to the Order of garnishment to the effect that it held no property of petitioner Phillips.

On September 10, 1974, the respondent sent a Subpoena Duces Tecum to petitioner Citizens State Bank requesting all records held by the bank pertaining to petitioner Phillips. Petitioner Citizens State Bank moved to quash the Subpoena. On October 4, 1974, the District Court overruled the motion to quash and found that the Subpoena was not unreasonable or oppressive. Appeal was taken to the Kansas Supreme Court, and dismissed, and a motion for rehearing was denied.

REASONS FOR DENYING WRITS

The Supreme Court of Kansas, in its dismissal of petitioners Phillips and Citizens State Bank's appeal, did not violate due process. It has been consistently held by the United States Supreme Court that it will not review a State Court decision resting on adequate and independent non-federal grounds. (See *Radio Station WOW* v. *Johnson*,

326 US 120 (1945)). In this instance, the Kansas Supreme Court dismissed because of lack of appellate jurisdiction as provided in KSA 60-2102 (4). (See petitioners' Appendix D). The Kansas Supreme Court has upheld on various occasions the right of a state legislature to place limits on the amount in controversy for appellate jurisdiction. (See *Downham* v. *City Council of Alexandria*, 9 Wall 659 (1870)). Therefore, there was nothing fundamentally unfair concerning a dismissal of an appeal which failed to meet the jurisdictional amount required. The Kansas Supreme Court's decision rested on an adequate and independent non-federal grounds.

It is true that KSA 60-2102 (3) (See petitioners' Appendix D) provides for appellate jurisdiction in cases involving constitutional questions, however, the instant case did not involve a violation of the due process clause of the Constitution. Such was the finding of the District Court of Sedgwick County, Kansas. (See petitioners' Appendix C). The Kansas Supreme Court, by dismissing the appeal by petitioners Citizens State Bank and Phillips, not only found that appellate jurisdiction was lacking, but also found by implication that no substantial constitutional issue was involved. If the Kansas Supreme Court had felt that there was evidence in the record on appeal of a constitutional violation, no dismissal would have been entered.

The United States Supreme Court has many times refused to grant Certiorari simply because the petitioner had made an averment of a constitutional violation. A real and substantial constitutional question must be involved before Certiorari will be granted. (See *Sawyer* v. *Piper*, 189 US 154 (1903); *Wick* v. *Chelan Electric Co.*, 280 US 108 (1927).

The requirements of due process are satisfied if one has been given reasonable notice and a reasonable oppor-

tunity to be heard. (See *Simon* v. *Kraft*, 182 US 427 (1901); *Dohany* v. *Rogers*, 281 US 362 (1930)). In the instant case, petitioner Phillips was given more than adequate notice and an opportunity to be heard. Petitioner Phillips was notified by telephone, by the administrative judge of Sedgwick County, Kansas, of the date of the trial, which was set for December 27, 1973. Petitioner Phillips, being a member of the Kansas Bar, certainly knows the procedure if he is scheduled to appear in another matter at the same time as the instant case was scheduled. Having been given ample notice of the trial, petitioner Phillips merely chose to ignore it, prompting the Court to enter default judgment on its own motion.

The three-day notice, as required by KSA 60-255 (a) (See Appendix A) before a default judgment may be entered, was not required in the instant case because the attorney for the respondent did not intend to take a default judgment when he entered the court room on December 27, 1973. Rather, he was prepared to try the case on its merits. The Court, upon failure of petitioner Phillips to appear, entered the default judgment on its own motion.

Having been given ample notice and opportunity to be heard, it cannot be said that petitioner Phillips was denied due process of law

CONCLUSION

Wherefore, respondent prays that Writs be denied.

Respectfully submitted,

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APPENDIX A

KSA 60-255. Default. (a) Entry. Upon request and proper showing by the party entitled thereto, the judge shall render judgment against a party in default for the remedy to which the party is entitled. But no judgment by default shall be entered against a minor or incapacitated person unless represented in the action by a guardian, conservator or other legally authorized representative who has appeared in the action, or by a guardian *ad litem* appointed by the court. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state.